Filed 4/7/09 Loerch v. Regents of the University of California CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TERRY LOERCH, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	D051154 (Super. Ct. No. GIC842170)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed.

Plaintiff Terry Loerch appeals the unanimous defense verdict for defendant the Regents of the University of California (the Regents). The jury rejected Loerch's claim an emergency room physician employed by the Regents negligently performed a lumbar puncture on him by inserting the needle in Loerch's spine in the wrong vertebral interspace.

On appeal, Loerch argues the trial court abused its discretion by refusing to investigate or replace two jurors who, during a recess in the middle of the 11-day trial, were overheard by Loerch's mother talking about being bored and about a movie and a certain actor from that movie. Loerch claims the jurors' comments were intended to ridicule and mock him.

Loerch also argues the court abused its discretion by sustaining an objection to a question by his counsel during cross-examination of the Regents' emergency room medical expert. Finally, Loerch argues the court abused its discretion when it denied his motion to augment his expert's declaration.

Our review of the record shows the trial court properly exercised its discretion in its handling of the alleged juror misconduct when it re-admonished the entire jury not to discuss the case and at the same time invited any juror with concerns about the admonitions to notify the court. The record further shows no juror came forward, there were no additional allegations of juror misconduct after the re-admonition, the attorneys for both parties then appeared satisfied with the court's handling of the alleged misconduct, and there was, in any event, no resulting prejudice to Loerch.

The record also shows the court acted well within its discretion when it sustained an objection to a question posed to the Regents' expert witness during cross-examination, and when it denied Loerch's motion to augment an expert designation, made by Loerch on the first day of trial. We thus affirm the judgment for the Regents.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Loerch sued the Regents and one of its emergency room physicians, Binh Ly, M.D., alleging negligence for injuries resulting from a lumbar puncture procedure performed by Dr. Ly.[2] The case was tried to a jury on the theory Dr. Ly inserted the lumbar puncture needle at the incorrect T12-L1 level, which was six to seven inches above the correct location, L4-L5. Loerch alleged the incorrect placement of the needle resulted in a hematoma (or blood clot) that damaged his spinal cord and nerve roots, leaving him unable to walk, to control his bowel and bladder functions and impotent. Loerch sought over $3 million for lost wages and future medical expenses.

Loerch went to the emergency room of University of California, San Diego's Thornton Hospital on December 12, 2003, complaining of severe headache, fever, pain in his low back, calves and neck and repeated vomiting. Three days earlier, Loerch consulted his primary care physician, Gary L. Matson, M.D., complaining of recurring pain in his testicle, bloody stools, severe diarrhea and intestinal cramping, which Loerch claims are symptoms of ulcerative colitis.

Dr. Ly performed the lumbar puncture procedure on December 12 to rule out subarachnoid hemorrhaging and meningitis of the brain or spine. Loerch's test results

---

1 Portions of the factual and procedural history of this case relevant to specific claims of error by Loerch are discussed *post*, in connection with those issues.

2 The parties stipulated Dr. Ly acted within the scope of his employment as an emergency room physician, and thus by the time of trial it appears the only defendant in the case was the Regents.

came back negative. Because catastrophic emergencies were ruled out, Loerch was discharged and told to consult his primary care physician.

Three days later, Loerch contacted Dr. Matson and told him his headache had not improved since his emergency room visit. Dr. Matson arranged to have Loerch admitted at Mercy Scripps Hospital.

On December 17, 2003, James Grisolia, M.D., a neurologist at Mercy Scripps Hospital, examined Loerch and determined that, while his examination was essentially normal, in addition to continuing migraine-type headache and viral symptoms that had caused Loerch to go to Thornton Hospital emergency room on December 12, Loerch had a new type of headache – a post lumbar puncture headache, or spinal tap headache, caused by leaking cerebrospinal fluid (CSF) from the lumbar puncture performed by Dr. Ly. Dr. Grisolia prescribed Loerch medication and recommended a blood patch to seal the leak if the post lumbar puncture headache persisted.[3] Dr. Grisolia saw no evidence of an ongoing hematoma compressing the spinal nerve roots (cauda equine) or the tip of the spine (conus), or other spinal injury. At his request, Loerch was discharged on December 17, 2003, before he received a blood patch.

Dr. Matson examined Loerch on December 19, 2003, after his release from the hospital. Dr. Matson assessed Loerch who was complaining of a low-grade fever, headaches and constipation, and recommended Loerch continue with various medications he was prescribed at the hospital for pain and constipation.

---

[3] A blood patch is an injection of the patient's own blood into the epidural space, with the expectation that it will form a blood clot and stop a CSF leak.

A few days later, Dr. Matson again saw Loerch, who complained of headache and dizziness when he stood up. Dr. Matson gave Loerch a neurological examination that again was essentially normal. However, because Loerch continued to exhibit symptoms consistent with spinal tap headache, Dr. Matson arranged for Loerch to return to Mercy Scripps Hospital for a blood patch.

On December 24, 2003, Robert Nye, M.D., the on-call anesthesiologist, placed a blood patch on Loerch at L4-L5 to seal the suspected CSF leak. Dr. Nye's written notes show he observed several needle marks on Loerch's spine at the L4-L5 level, specifically identifying the lumbar puncture entry site to be at approximately the L4-L5 interspace. Dr. Nye's written notes made no mention of any needle marks at T12-L1.[4]

One or two months after his blood patch, Loerch called Dr. Nye to complain of erectile dysfunction, leg weakness and loss of control of his bowel. During that telephone conversation, Dr. Nye mentioned to Loerch that the lumbar procedure might have been done "higher" than L4-L5.

Dr. Matson next saw Loerch on January 6, 2004, as a follow-up to his spinal patch. Dr. Matson noted Loerch's headache was "much better," although Loerch still complained of an ache in his back. Dr. Matson performed another neurological examination on Loerch and again found his exam normal.

---

4 At trial, however, Dr. Nye testified that in addition to the needle marks at L4-L5, he also saw one needle mark at the T12-L1 level. Dr. Nye did not make a written record of having seen the lumbar puncture needle mark at the T12-L1 level because at the time he did not believe it was "clinically significant."

Loerch went to see another neurologist, Bruce Lasker, M.D., in mid-February 2004, complaining of low back pain, pain in his right leg, urinary and sexual dysfunction and residual headaches of dizziness. Loerch told Dr. Lasker that an anesthesiologist (Dr. Nye) had told him the spinal tap may have been performed "high," or words to that effect. Dr. Lasker ordered an MRI (magnetic resonance imaging) of Loerch's lower spine.

Nathaniel Chuang, M.D., a radiologist, reviewed Loerch's February 2004 MRI films and concluded they were normal; he found no evidence of a recent injury to or hematoma compressing Loerch's spinal column, nor any other significant abnormality. Dr. Lasker also ordered MRI's done on Loerch's cervical spine and thoracic spine, and his brain, all of which were normal. Dr. Lasker treated Loerch until August 2004, and testified at trial that "more than likely than not" Loerch's problems were not caused by a lumbar puncture, regardless of the location.

After 11 days of testimony and argument, the jury deliberated for less than two hours before reaching a unanimous verdict for the Regents, finding Dr. Ly was not negligent in his care and treatment of Loerch in connection with the lumbar puncture procedure. Specifically, the jury found Dr. Ly did not insert the needle at the T12-L1 interspace during the lumbar procedure he performed on Loerch on December 12, 2003.

DISCUSSION

A. *Jury Misconduct*

Loerch argues the trial court erred when it re-admonished the entire jury not to discuss the case after two jurors were overheard allegedly talking about the case during a break in Loerch's testimony. Loerch argues the trial court instead should have removed

the two jurors or at least questioned them separately, and its failure to take either measure was an abuse of discretion.

" 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court. . . .' " (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A hearing regarding a juror's alleged misconduct " 'is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case. [Citation.]' " (*Ibid.*, quoting *People v. Ray* (1996) 13 Cal.4th 313, 343.) The decision to conduct a hearing in the first instance, to determine whether good cause exists to discharge a juror, is also reviewed under the abuse of discretion standard. (*People v. Burgener* (1986) 41 Cal.3d 505, 520, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 742.)

The California Supreme Court in *People v. Kaurish* (1990) 52 Cal.3d 648, 694, held a trial court was not required to conduct a hearing after a juror made a derogatory remark apparently directed at defense counsel—" 'Oh, you son-of-a __' "—when the defense rested its case. The court noted the juror's remark did not appear to be an indication that " 'improper or external influences were being brought to bear on a juror,' " but rather, was an expression of "momentary exasperation with the proceedings." (*Ibid.*)

1. *Misconduct*

Here, the alleged juror misconduct occurred near the middle of trial. While the court was in recess during Loerch's cross-examination, Loerch's mother overheard a

conversation between two jurors. Loerch's mother reported the incident to his counsel, who brought the matter to the attention of the court, which led to the following exchange:

"[Loerch's Counsel]: Your Honor, may I have a moment before the jury comes back? We're on the record. [¶] Your Honor, I've received information from . . . Loerch's . . . mother, that Jurors No. 2 and 3 are talking about the case outside of the trial courtroom, and that they are saying things to the effect that, 'Oh, my God, how boring. I know. All I could hear was wha, wha, wha. Yeah, you know, he sounds like Ferris Bueller. Ferris Bueller's day off. Bueller, Bueller. Yes, Ben Stern (sic). Bueller, Bueller. Yeah, I didn't listen to a thing. Yeah, ha, ha, ha.' You know, things to that effect were said yesterday, and then today the same sort of conduct. [¶] The two of them are looking at one another and shaking their heads during the testimony, and I saw that yesterday. I'm very concerned about whether or not these two jurors are conducting themselves appropriately outside this courtroom. I'd like to remove the two jurors, 2 and 3.

"THE COURT: Do you wish to be heard?

"[The Regents' Counsel]: Because they're bored or he's got information? I don't know what the information is, where it's from. I don't want to start losing jurors.

"THE COURT: Well, we'll have to -- my suggestion is that we keep 2 and 3 at the end of the break at noon and just ask them if they -- remind them that they are not to talk about the case or form or express any opinions about the case, and ask them if they have any concern about their willingness or ability to keep an open mind throughout the balance of the case.

"[The Regents' Counsel]: Okay.

"[Loerch's Counsel]: Very good.

"[The Regents' Counsel]: Are we going to single them out, or are we going to address that issue to the entire group?

"THE COURT: Well, I'm concerned about the observation was with 2 and 3, but there might have been other people involved in conversations.

"[Loerch's Counsel]: It's 2 and 3 that I'm concerned about, your Honor. I don't have any information about anybody else. I think we ought to take 2 and 3 individually.

"THE COURT: Okay. I'm going to change the approach a bit. At noon[,] I'm going to address this to the entire panel, and then I'm going to invite them that when they return at 1:30, that if they want to discuss this issue about keeping an open mind outside the presence of the rest of the jury, that they should notify the bailiff, and then we'll bring those people in if they have concerns.

"[Loerch's Counsel]: Okay.

"[The Regents' Counsel]: All right.

"THE COURT: I also have concern as to whether or not the snippets of conversation you heard had anything to do with the case, so that's why I'm not at this point prepared to be more pointed in regard to the observations."

At the next break, the trial court gave the following admonishment to the entire jury, as it and counsel had discussed:

"Ladies and gentlemen, let me remind you that you're not to discuss the case with anybody, even with each other, and you're also not to form or express any opinions about

the case. [¶] If anybody has any concerns about their willingness or ability to not discuss this case at all, anything that goes on with the case, we can either talk about it now, or if you want to at 1:30 when we come back, mention to the bailiff that you want to talk to me and to the attorneys about it outside the presence of the rest of the jury. But please don't form or express any opinions about the case. [¶] We'll see you back here at 1:30."

We conclude the trial court did not abuse its discretion in its handling of the alleged juror misconduct issue. Although initially the court stated it was inclined to raise the matter individually with juror Nos. 2 and 3, the court reconsidered that decision and decided the better way to proceed was to re-admonish the entire jury, and to invite any juror with concerns about his or her willingness to keep an open mind throughout the balance of the case to contact the bailiff. In making its decision, the court noted it was unsure whether the conversation between juror Nos. 2 and 3 had anything to do with the case.

Loerch argues the trial court erred because it neither granted any meaningful relief from the alleged misconduct nor investigated whether the jurors were talking about something other than Loerch's case. We disagree.

Claims of juror inattentiveness or boredom during trial ordinarily are insufficient to establish jury misconduct. (See e.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 418 [emphasizing its "unwillingness to allow the impeachment of jury verdicts on a bare showing that some jurors failed to conform their conduct to the ideal standard of utmost diligence in the performance of their duties," and noting that "[e]ven the most diligent juror may reach the end of his attention span at some point during a trial"].)

In addition, the record shows there were *no* additional issues of alleged juror misconduct, including during deliberations, after the court re-admonished the entire jury panel not to form or express any opinions about the case. The record also is devoid of evidence that any one of the jurors, including juror Nos. 2 and/or 3, came forward in response to the court's instruction – made at the same time it re-admonished the jury – that if any juror had concerns about his or her willingness or ability to remain unbiased and not discuss the case, he or she should notify the bailiff, who in turn would notify the court and counsel. If the issue of juror misconduct had been, or continued to be, a problem, it is likely one or more jurors would have raised the issue with the court.

Thus, the trial court's handling of the issue had the desired result, and was sufficient under the circumstances to curtail any further alleged juror misconduct.

Moreover, the record shows counsel for both parties appeared to agree with the court's *then*-handling of the alleged jury misconduct issue.[5] Although Loerch's counsel initially asked the court to remove juror Nos. 2 and 3 from the panel, after the court proposed the idea of re-admonishing the entire jury and instructing any of them to contact the bailiff if there were concerns about their (or any other jurors') ability to serve, the

---

[5] We need not decide whether Loerch forfeited the right to object to the court's handling of the alleged juror misconduct, despite the fact his counsel appears to have been in agreement with the trial court's suggestion that the entire jury be re-admonished. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 [claims of judicial misconduct are generally waived absent an objection in the trial court].) We thus do not decide whether it was "futile," as Loerch argues, to object further, if at all, to the court's decision to re-admonish the jury rather than dismiss and/or investigate juror Nos. 2 and 3. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 821 [the futility exception typically arises when the court has overruled the defendant's objections in a manner that suggests any further objections would be useless].)

record shows Loerch's counsel assented to that change in strategy. This evidence shows that counsel of both parties at the time agreed that the court's handling of the misconduct issue was reasonable.

The trial court's strategy, evaluated at the time of the alleged misconduct, was within the bounds of reason. As such, we conclude the court did not err when it decided not to dismiss juror Nos. 2 and 3, or conduct a hearing into their alleged misconduct.[6] (See *People v. Seaton* (2001) 26 Cal.4th 598, 676 ["specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion"]; *People v. Burgener*, *supra*, 41 Cal.3d at p. 520 [court's decision not to conduct a hearing to determine whether good cause exists to discharge a juror is reviewed for abuse of discretion].)

2. Prejudice

We further conclude the comments of juror Nos. 2 and 3 do not amount to *prejudicial* misconduct, assuming for the sake of argument such comments rise to the level of actionable misconduct in the first instance. (See *In re Carpenter* (1995) 9 Cal.4th 634, 668 [if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct, a reversal and new trial are not compelled].)

---

6 With the benefit of hindsight, which of course is always 20/20 (or better), the court may have considered bringing in Loerch's mother and speaking to her with trial counsel outside the presence of the jury, to verify what she overheard. Based on that minimal investigation, the court next could have decided whether it was necessary to speak to the two jurors involved in the alleged misconduct. Any such abuse of discretion, however, does not warrant reversal because we also conclude, *post*, there was no resulting prejudice to Loerch.

"It is well settled that a presumption of prejudice arises from any juror misconduct . . . . However, the presumption may be rebutted by proof that no prejudice actually resulted" (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156), or by a "reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct" (*Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 417).

Factors the courts consider in determining whether the presumption of prejudice has been rebutted include "the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 417; see also *People v. Von Villas* (1992) 11 Cal.App.4th 175, 256.)

Here, each of these factors weighs against a finding of prejudice. As noted, Loerch's evidence of misconduct consisted of a short conversation between two jurors during a recess in the middle of trial, reported by his mother, who overheard the jurors complaining of being bored and referencing a scene and an actor from the movie "Ferris Bueller." It is not at all clear whether the two jurors were talking about Loerch or his case, as evidenced by the trial court's decision not to take more aggressive measures against the jurors because of its concern that the "snippets" of conversation between them had nothing to do with Loerch's case. Our independent review of this record shows the evidence of misconduct was relatively weak, as was the nature and seriousness of such alleged misconduct.

Finally, the unanimous verdict for the Regents reached by the jury militates against a finding of prejudice from any alleged misconduct. Even if juror Nos. 2 and 3 engaged in serious misconduct, the votes of the remaining 10 jurors were more than sufficient to support the jury's verdict. (See *Newman v. Los Angeles Transit Lines* (1953) 120 Cal.App.2d 685, 694 ["if two jurors had slept throughout the trial, no prejudice was suffered [because the] jury returned a unanimous verdict, whereas the law required only three fourths of the jury to return a valid verdict"].)

Loerch argues *Newman v. Los Angeles Transit Lines* is distinguishable from his case because in *Newman* the two offending jurors had merely slept through the verdict. Loerch thus claims the jury misconduct in *Newman* was "neutral," whereas the misconduct of juror Nos. 2 and 3 here was anything but neutral, as he claims they were openly ridiculing him during the break. Loerch further argues other jurors *may* have overheard their conversation, *may* have understood it as mocking him, and *may* have been influenced by it.

There is no proof, however, that other jurors overheard the conversation between juror Nos. 2 and 3, understood it to deride and ridicule Loerch and/or were influenced by it. The record shows the trial court was concerned about whether the conversation between juror Nos. 2 and 3 even involved Loerch and his case, thus casting doubt on Loerch's theory the two jurors were openly mocking and ridiculing him. (See *People v. Davis* (1995) 10 Cal.4th 463, 548 [court has no duty to investigate juror misconduct or bias that is based on mere speculation]; *People v. Wilson* (1996) 43 Cal.App.4th 839, 852 [good cause, in the context of a petition for disclosure to support a motion for new trial

based on juror misconduct, does not exist where the allegations of jury misconduct are speculative, conclusory, vague or unsupported].) Because there is no reasonable probability Loerch was prejudiced by the trial court's decision not to investigate or replace juror Nos. 2 and 3, reversal of the verdict is unwarranted.

B. *Evidentiary Rulings*

Loerch next argues the trial court committed prejudicial error when it sustained the Regents' objection to the following question to the Regents' emergency room medical expert: "[Loerch's Counsel:] Do you have any explanation to tell these jurors why the *four needle marks* that Doctor Robert Nye saw on December 24, 2003, were all the same shape, all the same size, all the same color? Can you explain why they are all the same?" (Italics added.)

The trial court sustained the Regents' objection on the grounds of misstatement of the evidence.[7]

We review the trial court's rulings on evidentiary objections by applying an abuse of discretion standard. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) As a general proposition, "the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*In re Marriage of*

---

7 In his opening brief, Loerch also argued the trial court erred when it sustained the Regents' objection to his counsel's question, posed to the same expert witness, regarding whether Dr. Nye testified the risks outweighed the benefits of doing a blood patch at T12-L1. In his reply brief, however, Loerch admitted his trial counsel had in fact misstated the prior testimony of Dr. Nye.

Connolly (1979) 23 Cal.3d 590, 598.) A trial court abuses its discretion when "no judge would have reasonably made the same order under the same circumstances." (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1328.)

Here, the trial court sustained the Regents' objection to Loerch's question because it incorrectly summarized Dr. Nye's testimony as stating that he saw *four needle marks* on Loerch's back when he performed the "blood patch" procedure on Loerch on December 24, 2003. The record shows, however, that Dr. Nye was never able to say with certainty that he saw *four needle marks* on Loerch's back. Rather, based on his notes, Dr. Nye described "several needle marks, and [he] recall[ed], there were one or two needle marks in the paramedian region and around L4-5; another one or two more laterally paraspinally in L4, in the same region, L4-5; and another one centrally located approximately four or five inches higher at probably T12-L1 interspace, in the midline." Later, when asked directly how many needle marks there were in total, Dr. Nye testified: "I can't remember exactly, but at least three or four or more."

Loerch argues that while the "paraphrasing of the evidence in counsel's question was, by definition, inexact," it was, "nevertheless, substantially accurate -- not materially false or untrue." He further argues that, in any event, the statement about the number of needle marks was "immaterial" because the point of the question was that Dr. Nye had testified that the marks, "regardless of the exact number," were of the same appearance. Finally, he argues that by sustaining the objection to this question, the trial court "hopelessly confused the jurors' recollections of Dr. Nye's crucial testimony about why he thought the physician who performed the lumbar puncture, [Dr.] Ly, had inserted the

spinal needle not once but several times, not just at the L4-5 level but also at the dangerous T12-L1 level."

The record shows the trial court properly exercised its discretion in sustaining the Regents' objection. While Loerch claims the point of the question was not to establish Dr. Nye saw exactly four needle marks on Loerch's back, but rather that the needle marks all looked the same, the fact is the question required the Regents' expert to assume there were in fact four marks, when Dr. Nye had never testified as such.[8]

In addition, although the trial court sustained the objection, the court did not prevent Loerch's counsel from reframing the question and/or asking the Regents' expert one or more follow-up questions on this topic. (See *Waller v. Southern Pacific Co.* (1967) 66 Cal.2d 201, 210 [party must object to misstatement in a question, rather than raising the objection for the first time on appeal, so as not to deprive the questioning party "the opportunity to correct any errors there may have been in the questions"].) While Loerch in his brief blames the trial court for "hopelessly confusing" the jury when it sustained the objection to this question, he provides no explanation why his trial

---

8 Moreover, it would seem the form of the question was objectionable on another ground—it was compound. (See, e.g. *Kelley v. Bailey* (1961) 189 Cal.App.2d 728, 737.)

counsel did not continue to question the Regents' expert witness on this subject matter, particularly if, as he alleges, it was crucial to his case.[9]

We further conclude that even if the trial court erred in sustaining the Regents' objection to this question, that error was harmless. The trial court instructed the jury both at the start and at the end of the trial to decide the case based on the evidence and that, while witness's answers are evidence, an attorney's questions are not, except to the extent the question is incorporated into a witness's answer. The court also instructed the jury not to base its verdict on anything the court said, including ruling on objections, and explained that rulings on objections are based on procedural requirements that need not concern the jury.

In addition, the jury in fact heard testimony from Dr. Nye regarding the location of the needle marks he observed on Loerch's back on December 24, 2003, including one mark "centrally located approximately four or five inches higher at probably T12-L1 interspace, in the midline." When asked to describe these needle marks, Dr. Nye testified: "Like a typical needle entry site for, you know, a spinal, either injection or

---

9 Loerch relies on evidence of two notes submitted by jurors to support his argument the jury not only was "confused" by the court's sustaining of this one objection, but "hopelessly confused." The two notes provide no such support. One note was submitted by an alternate juror asking whether an expert determined there were four spinal markings on Loerch's back, and, if so, to identify that expert. Because it came from an alternate juror who was not participating in deliberations, the court ruled no response was necessary. The other note asked for a read back of Dr. Nye's testimony regarding the spinal marks. Although the court agreed to that request, the jury reached a unanimous verdict without waiting for the read back. Loerch's claim this second note shows the jury was "hopelessly confused" by the court's sustaining of this objection—six days earlier—therefore is undermined by what actually happened at trial and, in any event, is based on pure speculation. (See *People v. Davis*, *supra*, 10 Cal.4th at p. 548.)

lumbar puncture. After -- this was I guess two weeks, so I guess they were -- it was kind of red a little and a little bit brown in the center . . . ." Dr. Nye further testified that by the marks appearing brown, what he meant was that could have been a "drop of blood or a scab forming after a week or two," and that these spinal needle marks were "[p]retty much . . . to [his] recollection" equal in all respects.

In light of such testimony and the trial court's instructions to the jurors to decide the case based on the evidence, we conclude any error by the trial court in sustaining this objection was harmless.

C. *Motion to Augment*

Finally, Loerch argues the trial court committed prejudicial error when it denied his motion to augment the deposition testimony of his expert neurologist, Carl Orfuss, M.D., to include testimony that the February 2004 MRI (ordered by Dr. Lasker) showed a blood clot on Loerch's spine from T10 down to L4 and nerve damage from L4 to L5. Loerch filed his motion on February 13, 2007—the day trial commenced.

1. *Background*

Briefly, Loerch's counsel sent Dr. Orfuss a disk in February 2006 containing the February 2004 MRI read by Dr. Chuang, who issued a report stating the MRI was normal and showed no abnormalities. In June 2006 during his deposition, Dr. Orfuss revealed he had not reviewed the February 2004 MRI. Loerch's counsel was present at that

deposition.[10] Before reviewing Loerch's February 2004 MRI, Dr. Orfuss had opined a blood clot had caused Loerch's symptoms, but that the clot had been reabsorbed by the time the MRI study was done and thus was not visible on the film.

In opposing the motion to augment, the Regents noted that during the next seven months following Dr. Orfuss's deposition, Loerch's counsel never renewed his request for Dr. Orfuss to review the February 2004 MRI nor did he ask why Dr. Orfuss had not reviewed it in preparation for his June 2006 deposition. Instead, Loerch's counsel waited until January 29, 2007—two weeks before trial—to notify the Regents that Loerch's counsel (allegedly) had just learned that Dr. Orfuss had never received the February 2004 MRI. At that point, Loerch's counsel provided Dr. Orfuss with another copy of the film, and Dr. Orfuss in turn opined that a blood clot from T10 to L4 and nerve damage from L4 to L5 were visible on the film. Loerch's counsel offered to make Dr. Orfuss available on February 12, 2007—the day before trial—for an additional deposition in connection with his new foundational findings.

The court denied the motion to augment on the grounds it was untimely. It found Dr. Orfuss "was deposed in June of '06. The existence of the MRI was known at the time of the deposition, and why he didn't review it was not explored at the deposition, which would have been the appropriate point in time to do so."

---

[10] Loerch's counsel claimed Dr. Orfuss's office either misplaced the disk or never received it in the mail.

2. *Law and Analysis*

Code of Civil Procedure section 2034.610, subdivision (b), provides the trial court may grant leave to augment a party's expert witness list after the deadline for deposing experts has passed only under "exceptional circumstances."[11] Whether to grant such relief is within the sound discretion of the trial court and its decision will not be overturned on appeal absent an abuse of such discretion. (See *Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476 ["[t]he decision to grant relief from the failure to designate an expert witness is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of manifest abuse of that discretion"].)

Here, Loerch argues his counsel's seven-month delay, between the time he learned Dr. Orfuss had not received Loerch's February 2004 MRI and when his counsel finally provided him with another copy, is not a sufficient reason for the court to have denied his motion to augment. We disagree. To the contrary, the record shows the court was fully justified in denying Loerch's motion as untimely. During his deposition in June 2006, Dr. Orfuss said he had not reviewed Loerch's February 2004 MRI. Loerch's counsel thus would have known by the date of Dr. Orfuss's deposition—at the very latest—that he had not received the MRI sent to him several months earlier.

For whatever reason—because none is evident from the record—Loerch's counsel waited until late January 2007 to provide Dr. Orfuss with another copy of the February 2004 MRI. When Dr. Orfuss claimed the MRI showed a blood clot (contrary to the

---

11 The deadline for completing expert witness depositions is the 15th day before the date initially set for trial. (Code Civ. Proc., § 2024.030.)

conclusion of Dr. Chuang), Loerch agreed to make Dr. Orfuss available for an additional deposition. Loerch then filed a motion to augment on the day trial started.

Under these circumstances, we cannot say the trial court "exceeded the bounds of reason" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566) when it denied Loerch's motion as untimely, particularly in light of the unexplained seven-month gap between Loerch's counsel's discovery that Dr. Orfuss had not received Loerch's February 2004 MRI, and his counsel's providing Dr. Orfuss with another copy of the film. (See *Dickison v. Howen*, *supra*, 220 Cal.App.3d at p. 1478 [surprise justifying augmentation of an expert witness list is one that could not have been prevented by the exercise of due diligence]; see also Code Civ. Proc., § 2034.620, subds. (c) (1), (2).)

In addition, we also reject Loerch's argument that "exceptional circumstances" justified his counsel's lack of diligence in providing Dr. Orfuss with another copy of Loerch's February 2004 MRI. (See Code Civ. Proc., § 2034.610, subd. (b).) Loerch first argues "exceptional circumstances" existed because the Regents did not oppose his motion to augment. However, Loerch cites no legal authority to support this argument. (See *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 ["Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing

court"].) In any event, we need not decide this issue because it is clear from the record that the Regents did in fact strongly oppose Loerch's motion.[12]

Loerch also argues "exceptional circumstances" existed because his counsel (allegedly) did not realize the February 2004 MRI "contained anything of value." If Loerch's counsel did not believe the February 2004 MRI contained anything of value, why then, as the Regents notes, did Loerch's counsel send it to Dr. Orfuss in the first place, months before his deposition? Moreover, the decision whether the film was of value to Loerch and his case presumably would derive not from Loerch's counsel, but from his retained medical expert, which undoubtedly is why Loerch's counsel sent it to Dr. Orfuss to review.

Finally, we also reject Loerch's argument that "exceptional circumstances" existed because the additional testimony of Dr. Orfuss was "crucial" to his case. Loerch again provides no legal authority to support this contention. (See *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.) In any event, the record does not support this argument, which he also raises for the first time on appeal. (See *Newton v. Clemons*, *supra*, 110 Cal.App.4th at p. 11.)

In an attempt to show the Regents would suffer little or no prejudice if the court allowed the augmented testimony of Dr. Orfuss (based on the February 2004 MRI),

---

12 We also do not decide whether Loerch waived or forfeited his right to argue "exceptional circumstances" existed in this case, based on his failure to raise that issue in the trial court. (See *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [a reviewing court " 'will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court' "], fn. omitted.)

Loerch's counsel argued that such testimony merely confirmed what Dr. Orfuss had *already* testified to in his deposition—that Loerch's symptoms resulted from a blood clot at T12-L1, which was reabsorbed. Loerch's counsel also argued that such testimony would not change any of Dr. Orfuss's expert opinions in this case.

Thus, far from arguing that such evidence was "critical" to his case, a point open to debate,[13] Loerch's counsel clearly suggested in oral argument before the trial court that such evidence merely *corroborated* Dr. Orfuss's earlier deposition testimony. On this record, we conclude the trial court acted well within its discretion when it denied Loerch's motion to augment the testimony of Dr. Orfuss, brought by Loerch on the first day of trial.[14]

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the Regents.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.

13 The Regents claims the augmented testimony of Dr. Orfuss was of limited relevance on the issue of *where* Dr. Ly inserted the lumbar puncture needle in Loerch's spine, which according to Loerch, was the *pivotal* issue in his case.

14 Because we conclude Loerch's claims of errors are meritless or harmless, we reject his argument the cumulative effect of the trial court's errors deprived him of a fair trial.